

LAW AND PUBLIC SAFETY

DIVISION ON CIVIL RIGHTS

Employment Advertising

Proposed Readoption with Amendments: N.J.A.C. 13:11

Proposed Repeals: N.J.A.C. 13:11-1.3 and 1.8

Authorized by: J. Frank Vespa-Papaleo, Esq., Director, Division on Civil Rights

Authority: N.J.S.A. 10:5-8 and 10:5-12

Calendar Reference: See Summary below for explanation of exception to calendar requirement

Proposal Number: PRN 2006-251

Submit comments by November 4, 2006 to:

Gary LoCassio, Assistant Director

Division on Civil Rights

P.O. Box 089

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The agency proposal follows:

Summary

The New Jersey Division on Civil Rights (Division), in the Department of Law and Public Safety, enforces the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. Pursuant to N.J.S.A. 52:14B-5.1c, the Division's rules concerning employment advertising, N.J.A.C. 13:11, expire on December 28, 2006. The Division has reviewed these rules and has determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. However, the Division, pursuant to its rulemaking authority found at N.J.S.A. 10:5-8, proposes amendments to

N.J.A.C. 13:11 to ensure consistency with the statutory prohibitions against discriminatory advertising contained in the LAD, to make clear that the rules govern employment advertising in any form of media, whether print or electronic, to delete outdated provisions and to provide a more efficient process for employers and media sources to obtain a ruling from the Division on a bona fide occupational qualification exception to the rules.

The LAD makes it unlawful for employers, employment agencies and labor organizations to print or circulate or cause to be printed or circulated any statement, advertisement or publication which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, ancestry, age, marital status, domestic partnership status, sex, nationality, affectional or sexual orientation, disability, atypical hereditary cellular or blood trait, genetic information, refusal to submit to a genetic test or to make available the results of a genetic test, or liability for service in the Armed Forces of the United States, unless based upon a bona fide occupational qualification. See N.J.S.A. 10:5-12c. The chapter being proposed for readoption with amendments addresses these prohibitions. Additionally, the New Jersey Supreme Court has determined that newspapers are properly subject to the rules being proposed for readoption, since they would be “aiding” and “abetting” discriminatory advertising by publishing such ads in their publications. See *Passaic Daily News v. Blair*, 63 N.J. 474, 488 (1973); N.J.S.A. 10:5-12e.

The following is a summary of N.J.A.C. 13:11 and the proposed amendments thereto, as well as the proposed repeals to the chapter.

N.J.A.C. 13:11-1.1 sets forth the general rules prohibiting discriminatory employment advertising. N.J.A.C. 13:11-1.1(a) prohibits employers, labor unions, employment agencies or media outlets from printing, publishing or circulating any advertisement relating to employment that expresses, directly or indirectly, any discrimination or preference based on characteristics protected by the LAD. The Division proposes to amend N.J.A.C. 13:11-1.1(a) to make clear that employment advertisements are covered by this chapter regardless of the form of media in which the advertisement appears. Accordingly, the Division proposes amendments to expressly govern advertisements that appear either in print or electronically. These proposed amendments to address employment advertisements posted electronically are similar to prohibitions recently adopted by the Division in its chapter on real estate advertising. The Division also proposes to add domestic partnership status to the rule to maintain consistency with recent changes to the LAD. N.J.A.C. 13:11-1.1(b) prohibits the use of any term, phrase or expression in an advertisement that is meant to attract or repel any person because of a protected characteristic. While maintaining the general prohibition against the use of such terms, the Division proposes deleting certain examples that were initially adopted when the rules were first promulgated in 1972 but no longer appear relevant. The Division also proposes amendments to N.J.A.C. 13:11-1.1(b) to make the protected categories in the rules consistent with the prohibitions of the LAD. N.J.A.C. 13:11-1.1(c) provides examples of certain phrases regarding equal opportunity that are deemed not to violate the rules.

N.J.A.C. 13:11-1.2 sets forth an exception to the rules for advertising ordered by the Director.

The Division proposes repealing N.J.A.C. 13:11-1.3, which addresses the maintenance of segregated columns. The maintenance of segregated columns by newspapers is a practice that appears to have disappeared since these rules were first promulgated. Accordingly, the Division believes that there no longer needs to be a rule specifically addressing this practice. However, to maintain the general prohibition, the Division is proposing to amend N.J.A.C. 13:11-1.4 to make clear that the prohibitions against discriminatory advertising apply to both the body of the ads as well as the column headings under which an ad is placed.

With the repeal of N.J.A.C. 13:11-1.3, the Division proposes recodifying N.J.A.C. 13:11-1.4 as N.J.A.C. 13:11-1.3. The rule addresses the prohibitions against preferences based on protected categories in employment advertisements. As discussed above, the Division is proposing amending the heading to reflect that the rule governs both the body of the advertisement and the column heading. Upon readoption, the Division is proposing amendments to existing N.J.A.C. 13:11-1.4(a) similar to those proposed in N.J.A.C.13:11-1.1 with respect to electronic ads as well as ensuring that the protected categories in the rules are consistent those contained in the LAD. The rule also address the use of gender-neutral job titles. The Division is proposing stylistic amendments to N.J.A.C. 13:11-1.4(b) and (c) to clarify the requirements without any change in the substance of the rules. The Division is also proposing certain amendments to the examples of prohibited job titles and permissible substitutes contained in N.J.A.C. 13:11-1.4(d). The Division proposes deleting as permissible substitutes the use of opposite-sex counterparts, such as “Salesman/Saleswoman” or “Pressman/woman” when clear gender neutral terms exist, such as “Salesperson” and “Press Operator.” The Division also

proposes to delete the term “Waiter” as a prohibited job title, since the term is gaining acceptance as a gender-neutral term. In its place, the Division proposes adding “waitress” as an example of a prohibited job title. For the same reason, the Division proposes replacing “Hostess” with the term “Host.”

The Division proposes recodifying existing N.J.A.C. 13:11-1.5 as N.J.A.C. 13:11-1.4. This rule provides for an exception that would permit an employer to place an advertisement soliciting job applicants of a particular protected class when membership in that class is a bona fide occupational qualification (BFOQ). There may be an BFOQ exception when, for example, an employer for authenticity needs to hire an actor that is in a particular class or needs to hire an employee of a particular gender when the job in question involves intimate personal contact. The Division proposes to amend this rule upon readoption to make the protected categories consistent with the LAD.

The Division proposes recodifying existing N.J.A.C. 13:11-1.6 as N.J.A.C. 13:11-1.5. This rule sets forth the process by which an employer or the publisher may request a ruling by the Division on a request for a BFOQ exception. The Division proposes to amend N.J.A.C. 13:11-1.6 upon readoption to make the request process more efficient. The proposed amendments would require that requests be directed to the Division’s Bureau of Policy, its legal unit that issues the rulings, rather than to the regional offices. If the inquiry is being made with respect to a specific advertisement, the requestor would be required to submit a copy of the advertisement with the request. The rule would also provide that the Division would give issue an opinion as soon as practicable following receipt of all relevant material and information in connection with the inquiry. While the Division will still strive to issue an opinion the same day that a request is made, the

Division proposes deleting the suggested two-hour time frame in the existing rules since such a turn-around time has not always been possible with the Division's limited resources.

The Division proposes recodifying existing N.J.A.C. 13:11-1.7 as N.J.A.C. 13:11-1.6. This rule provides that the failure to comply with this chapter shall be deemed a violation of the LAD.

The Division proposes repealing N.J.A.C. 13:11-1.8, which sets forth the original effective date of the rules, as it is unnecessary to current compliance.

As the Division has provided a 60-day comment period on the notice for this proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The rules proposed for readoption with amendments will have a beneficial impact on the residents of New Jersey by clarifying that discriminatory advertising in all forms is prohibited, by deleting provisions that are no longer essential to the regulation of employment advertising and by making the rules consistent with the requirements of the LAD.

Economic Impact

The rules proposed for readoption with amendments will have no economic impact on employers or the newspapers and other media which publish employment advertising since all legal obligations arising under the rules have been mandated by existing Federal or State law. Therefore, the readoption with amendments presents no new legal obligations. The rules may assist the regulated entities in complying with the existing legal requirements by providing examples of permissible and impermissible conduct. The rules also provide a mechanism by which employers and publishers may

obtain opinions from the Division regarding BFOQ exceptions, in order to avoid liability for potentially discriminatory ads.

Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption and the proposed amendments do not exceed Federal standards. Federal law prohibits discriminatory employment advertising based on race, color, religion, sex, disability, age or national origin. See 42 U.S.C. §2000e-3(b); 29 U.S.C. §623(d); 29 C.F.R. §1630.4(a). The proposed amendments are consistent with the prohibitions against discriminatory employment advertising contained in Federal law. To the extent that the prohibitions against discriminatory advertising based on marital status, affectional or sexual orientation, liability for service in the Armed Forces and domestic partnership status exceed applicable provisions in federal law, the LAD mandates such provisions.

Jobs Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the number of jobs in the State.

Agriculture Industry Impact

The Division believes that the rules proposed for readoption with amendments will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The Division believes that the rules proposed for readoption with amendments will not impose reporting, recordkeeping or other compliance requirements on small businesses as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et. seq. The rules proposed for readoption with amendments merely implement the prohibitions against the use of discriminatory statements in employment advertising that are contained in the LAD. Although the rules proposed for readoption with amendments

may impact the advertising activities of small businesses that are employers, and possibly media sources that publish employment advertisements, they do not impose new obligations other than those already mandated by existing Federal or State laws. To the extent that the rules proposed for readoption with amendments will clarify the advertising restrictions under existing law, the rules should obviate the need for small business to retain professional services in order to comply with these provisions. No professional services are required for compliance.

Smart Growth Impact

The Division does not anticipate that the rules proposed for readoption with amendments will have any impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan, otherwise known as the State Plan.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:11.

Full text of the proposed amendments and repeals follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:11-1.1 Employment advertising generally

(a) It shall be a violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and more particularly, N.J.S.A. 10:5-12(a), (b), (c) and (e), for any employer, union or employment agency, or any newspaper or other publication published or circulated within this State to print, publish, **post** or circulate, **or to cause to be printed, published, posted or circulated,** any **print, electronic or other** advertisement relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs or any of the terms, conditions or privileges thereof

which expresses, overtly or subtly, directly or indirectly, any limitation, specification, preference or discrimination based on race, creed, color, national origin, ancestry, age, marital status, **domestic partnership status**, sex, nationality, affectional or sexual orientation, disability, atypical hereditary cellular or blood trait, genetic information, refusal to submit to a genetic test or to make available the results of a genetic test, or liability for service in the Armed Forces of the United States, or any intent to make such limitation, unless based on a bona fide occupational qualification.

(b) The use of [language including but not limited to "Black", "Negro", "colored", "white", "restricted", "interracial", "segregated", "Christian", "Jewish", "men", "women", "girl", "boy", "gal", "guy", "married", "single" or any other] **any** word, term, phrase or expression which tends to influence, persuade or dissuade, encourage or discourage, attract or repel, any person or persons because of race, creed, color, national origin, ancestry, age, marital status, **domestic partnership status, nationality, affectional or sexual orientation, disability, atypical hereditary cellular or blood trait, genetic information, refusal to submit to a genetic test or to make available the results of a genetic test, or liability for service in the Armed Forces of the United States** or sex shall be considered discriminatory advertising in violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

(c) (No change.)

[13:11-1.3 Maintenance of segregated columns

It shall be a violation of the Law Against Discrimination for any employer, union or employment agency or any newspaper or other publication published or circulated within this State to publish, print, or circulate or cause to be published, printed, or

circulated any advertisement relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs or any of the terms, conditions or privileges thereof under an employment advertisement column which is segregated on the bases of sex, marital status, race, creed, color, national origin, ancestry or age or under any column heading which expresses overtly or subtly, directly or indirectly, any preference, specification or limitation.]

13:11-[1.4]1.3 Preferences expressed in column heading or body of advertisement [appearing under joint "Men and Women" columns]

(a) It shall be a violation of the Law Against Discrimination for any employer, union or employment agency, or any newspaper or other publication published or circulated within this State to publish, print, post or circulate or cause to be published, printed, posted or circulated any print, electronic or other advertisement relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs, or any of the terms, conditions or privileges thereof, the language of which advertisement expresses any limitation, specification, discrimination or preference as to sex, affectional or sexual orientation, marital status, domestic partnership status, race, creed, color, national origin, ancestry, nationality, disability, liability for service in the Armed Forces of the United States or age of any intent to make such preference, specification or discrimination unless sex, affectional or sexual orientation, marital status, domestic partnership status, race, creed, color, national origin, ancestry, nationality, disability, liability for service in the Armed Forces of the

United States or age is a bona fide occupational qualification for the particular job advertised.

(b) Whenever a "help wanted" advertisement is to contain any job title or job description **for a position that is not one for which sex is a "bona fide occupational qualification" as defined in those provisions, the job title shall be stated in terms that are** [which is not clearly] neutral in terms of sex, [and the job advertised is not one for which sex is a "bona fide occupational qualification" as defined in those provisions, then the advertisement should instead utilize a neutral job title whenever,] **unless use of a gender-neutral job title is not** practicable.

(c) (No change.)

(d) Newspapers [which] **that** print employment advertisements **using the designation "M/W"** are encouraged to voluntarily print a box on their employment advertising page indicating that the abbreviation "M/W" when used means "men or women".

Examples of
Prohibited Terms

"Salesman"
["Waiter"] **"Waitress"**
"Gal Friday"
"Hostess"
"Pressman"

Examples of
Permissible Substitutes

"Salesperson" [or "Salesman/women"
or "Salesman M/W"]
"Server" or "Waiter/waitress" or "Waiter M/W"
"General Office Work" [or "Gal/guy
Friday" or "Gal Friday M/W"]
"Hostess/host" or "[Hostess] **Host** M/W"
"Press operator" [or
"Pressman/woman" or "Pressman
M/W"]

(e) (No change.)

13:11-[1.5]1.4 Bona fide occupational qualification exception; application

(a) – (b) (No change.)

(c) The employer, employment agency or union has the burden of establishing that race, creed, color, national origin, ancestry, **nationality**, age, marital status, **affectional or sexual orientation, domestic partnership status, disability, liability for service in the Armed Forces of the United States** or sex is a bona fide occupational qualification.

(d) The application of the exception is not warranted where based on, for example:

1. Assumptions of the comparative general employment characteristics of persons of a particular race, creed, color, national origin, ancestry, **nationality**, age, sex, **affectional or sexual orientation, domestic partnership status, disability liability for service in the Armed Forces of the United States** or marital status, such as their turnover rate;

2.-4. (No change.)

(e) (No change.)

13:11-[1.6]1.5 Ruling by Division on bona fide occupational qualifications for particular jobs

(a) Any employer, union, employment agency, newspaper or other publication may make an inquiry of the Division on Civil Rights ([at 1100 Raymond Boulevard, Newark, New Jersey 201-648-2700; or 436 East State Street, Trenton, New Jersey 609-292-4605; or 530 Cooper Street, Camden, New Jersey 609-964-0011; or 370 Broadway,

Paterson, New Jersey 201-345-1465] **to the Bureau of Policy at (609) 984-7091, 140 East Front Street, Trenton, New Jersey 08625-0089**) as to whether race, creed, color, national origin, ancestry, **nationality**, age, sex, **affectional or sexual orientation**, **disability, liability for service in the Armed Forces of the United States, domestic partnership status** or marital status is a bona fide occupational qualification for a particular job which they intend to publish, print or circulate or cause to be published, printed or circulated. **If an inquiry is made with respect to a specific advertisement, the entity making the inquiry shall supply a copy of the advertisement the entity seeks to publish.**

(b) The Division shall [promptly, and whenever possible, no later than two hours after the inquiry is received,] give opinions in response to such inquiries **as soon as practicable following receipt of all relevant material and information in connection with the inquiry.**

(c) An opinion rendered orally or in writing by the Division prior to the publication of any advertisement in response to such an inquiry shall be binding for the purpose of these provisions, except in those instances in which the inquiry has not fully and accurately disclosed the relevant facts regarding the particular job **or advertisement** in question.

(d) (No change.)

(e) A newspaper or other publication shall not be in violation of these provisions where it has accepted any specific advertisement in good faith and in reasonable reliance upon the representations of the person placing the advertisement that he **or she** has

obtained from the Division an opinion that there is a bona fide occupational qualification for the specific job advertised together with the identification number of that opinion.

Recodify existing N.J.A.C.13:11-1.7 as 13:11-1.6 (No change in text).

[13:11-1.8 Effective date

- (a) These provisions are adopted and effective on April 14, 1972.
- (b) The obligation of those persons covered by these provisions to comply with its terms shall commence on May 29, 1972.]